81-67

No.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN E. ALTMAN, et al.,

Petitioners,

v.

HEALTH AND HOSPITALS GOVERNING COMMISSION OF COOK COUNTY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

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QUESTIONS PRESENTED

1. Whether public employees who have property interests in their jobs and who have been laid off are entitled to an opportunity to contest the reasons and propriety of the layoff.

2. Whether public employees who have property interests in their jobs and who have been laid off should be given a reasonably adequate written statement of the basis for the layoff decision and disclosure of the economic and other information used in making the decision.

PARTIES IN THE APPELLATE COURT OF ILLINOIS

The parties in the Appellate Court of Illinois were John E. Altman, et al., (petitioner in this Court)* and The Health and Hospital Governing Commission of Cook County (respondent in this Court).

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* In addition, the following persons are also petitioners in this Court and were parties in the Appellate Court of Illinois:

Edward Brooks, Van Frazier, William Hackett, Robert Lemaich, Fred Mason, Nick Porro, Wilfred Thompson, Joseph Truesdale, Larue Zanders, Donald Malone, Robert Wilson, Charles Craig, Robert A. Kelly, Anthony Mannina, Donald Prisco, Dennis Ross, Frank Horacek, John V. Andersen, Edmond Harris, Donald Ahlstrand, Melbourne Jackson, Carl Orlandese, Peter Scales, Angelo Vaci, Joseph DeRaimo, James Turner, Harold Brown, William Powers, Eugene Ryan, Charles Jones, Edwin Hill, Frank DiFoggio, Gerald Pagliuco, Alexander Glab, John Griffin, Bart Flynn, Byron E. Daniels, Neva Rel Sanders, Ruby Hardin, John T. Haas, Kenneth O. Anderson, Thomas R. Aulisa, Louis Barney, James Brannock, Joseph Buonicontro, George E. Busse, Daniel L. Carlyle, Albert Cohen, Wardell K. Cox, Jr., John A. Crocco, Herman Deer, Calvin Dennler, Gary B. Ellinger, Thurman Hadley, Finn Hansen, John G. Israel, Eddie Johnson, Casimir Lukowski, Henry Morrow, George Norgard, William Rankin, Plez Richardson, Sam Samuels, Henry Schioniger, John Sears, Robert E. Seedorf, Mertes Smith, Frank S. Srebro, Robert Taylor, William A. Tedor, James Yadgir, Harry J. Bergstrom, Albert Franchi, Bernard Toland, Lester Roberts, Charles Chiappa, Frank A. Flynn, Charles E. Gould, Anthony Kalabic, Charles Youlden, Thomas E. Young and Anthony Promisco.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No.

JOHN E. ALTMAN, et al.,

Petitioners,

v.

HEALTH AND HOSPITAL GOVERNING COMMISSION OF COOK COUNTY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS

JOHN E. ALTMAN, et al., petitions for a Writ of Certiorari to review the judgment of the Appellate Court of Illinois, entered on December 2, 1980. The Supreme Court of Illinois denied petitioners' Petition for Leave to Appeal on March 30, 1981.

OPINIONS BELOW

The Decision of the Circuit Court of Cook County, Illinois, granting the relief sought by petitioners (10a) has not been officially reported.

The Opinion of the Appellate Court of Illinois reversing the Order of the Circuit Court has been officially reported at 91 Ill. App. 3d 498, 414 N.E.2d 1091 (1980) (1a).

JURISDICTION

The Order of the Supreme Court of Illinois denying petitioners' Petition for Leave to Appeal was entered on March 30, 1981. (22a) Petitioners are filing this Petition for a Writ of Certiorari within ninety (90) days of the Supreme Court of Illinois' Decision.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 14 to the United States Constitution provides in pertinent part as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV

Amendment 5 to the United States Constitution provides in pertinent part as follows:

> "No person shall . . . be deprived of life, liberty or property, without due process of law. . ." U.S. Const. amend. V.

STATEMENT OF THE CASE

Petitioners are painters, plumbers, pasterers, latherers, carpenters, glaziers, bricklayers, electricians, carpenters and laborers who worked for respondent, Health and Hosiptals Governing Commission of Cook County (hereinafter the Commission). The Commission had statutory authority to operate and manage Oak Forest and Cook County Hospitals. These are large, public hospitals serving the citizens of the State of Illinois. As public employees, petitioners possessed statutory rights protecting them from discharge except for cause and upon written charges. Ill. Rev. Stat., ch. 34 Sec. 5026.

On March 27, 1978, petitioners received written notices informing them they would be laid off for lack of work effective April 7, 1978. The Commission's members and managers met in March, 1978, prior to the lay off notices being given, to discuss the elimination of in-house construction work. The Commission intended to terminate construction work performed by petitioners. The Commission members and managers also concluded that the activities of Cook County Hospital's paint shop bricklaying and plastering crews should be terminated, but that the number of employees on other crews should be reduced. Shortly after the petitioners were laid off, the Commission entered into contractual arrangements with various companies for the purpose of performing the work which had previously been performed by petitioners. The companies engaged to perform such work received payment on the basis of hourly wage rates substantially greater than those earned by petitioners.

After petitioners were laid off, some of them requested an opportunity to contest the reasons given them for their lay off. In essence, petitioners wanted to demonstrate that sufficient funds existed to maintain them on

the payroll. The Commission convened a hearing, conducted by one of its hearing officers. At this hearing, petitioners requested the issuance of an appropriate subpoena to obtain economic data upon which the Commission relied in deciding that petitioners should be laid off. The request for this economic information was denied. The hearing officer held petitioners could not "contest the validity of the reasons for the lay off." (21a)

Petitioners filed a Complaint in the Circuit Court of Cook County requesting that they be returned to work, and made whole for wages lost and asserted their constitutional rights to due process of law had been denied. After an evidentiary hearing, the trial court held that the hearing afforded petitioners was inadequate, because the Commission refused to allow them to challenge the reasons for their lay off. (13a) The trial court also held that the Commission's conduct of laying off employees for alleged lack of funds and engaging private companies to perform the services of the employees constituted bad faith. The constitutional issue of due process of law arising from the inadequacy of the hearing afforded petitioners was first raised in the trial court.

The Appellate Court of Illinois acknowledged the constitutionally protected property interests which petitioners have in their employment with the Commission, but held the hearing afforded petitioners was not inadequate. (8a) The Commission argued in the Appellate Court that its hearing procedures were proper. Petitioners argued the failure to provide necessary economic information in a post-lay off hearing and the refusal to provide a forum to contest the validity of the lay offs violated Federal and State constitutional rights.

On March 30, 1981, the Supreme Court of Illinois denied Petitioners' Petition for Leave to Appeal. (22a)

REASONS FOR GRANTING THE WRIT

Review By This Court Is Warranted To Resolve A Conflict Between Decisions Of A State Court And A Federal Court Of Appeals

Review should be granted in order to resolve a substantial conflict between the decision of the Appellate Court of Illinois and decisions of the United States Court of Appeals for Seventh Circuit concerning the rights of laid off public employees to be given adequate written statements of the basis of the lay off, disclosure of the information used to decide the lay off and an opportunity to respond. Petitioners are merely seeking the right to a post rather than pre-lay off due process proceeding.

In *Johnson* v. *Board of Regents of The University of Wisconsin*, 377 F. Supp. 227 (W.D. Wis. 1974), *aff'd.*, 510 F.2d 975 (7th Cir. 1975), faculty members laid off from the University of Wisconsin for economic reasons protested the University's failure to provide adequate due process of law. Those faculty members were laid off for the same reasons as petitioners in the instant case. A district court held tenured faculty members are entitled to an opportunity to show the true reasons for their lay offs were constitutionally impermissible and the designation of a particular faculty member for a lay off was arbitrary and unreasonable. Post-lay off due process procedures required by the court are:

1. Each employee is entitled to be furnished with a reasonably adequate written statement of the basis for the initial lay off decision.

2. Each employee should be furnished with a reasonably adequate description of the manner in which the initial decision was reached.

3. Each employee should be furnished with reasonably adequate disclosure of the information and data upon which the decision makers had relied.

4. Each employee should be entitled to an opportunity to respond. 377 F. Supp. at 240.

The court was satisfied that these minimum due process procedures had been met by disclosure of necessary information to the tenured faculty members. The information required in *Johnson* was not afforded petitioners herein.[1]

However, in a published opinion concerning the rights of laid off employees, the Seventh Circuit held that such employees are entitled to obtain review of a lay off decision to insure that it was not for impermissible reason or to demonstrate the employees should have been retained on the job. *Mims* v. *Board of Education of the City of Chicago,* 523 F.2d 711 (7th Cir. 1975).

In direct contradiction to the constitutional interpretation of due process by the Seventh Circuit, The Appellate Court of Illinois declined to afford petitioners procedural safeguards to contest crucial job decisions affecting them. The court acknowledged the scope of the hearing afforded petitioners was limited. It relied upon a decision of the Supreme Court of Illinois, *Powell* v. *Jones,* 56 Ill. 2d 70, 305 N.E. 2d 166 (1973) in which the court denied employees' requests for pre-lay off plenary hearings. The court was satisfied that existing Civil Service rules allow-

[1] The decision of the Court of Appeals was not published.

ing employees to request reconsideration of the lay off decision and to demonstrate impropriety or illegality of lay off actions granted sufficient due process rights. The Appellate Court erred in relying on *Powell* v. *Jones*, because the petitioners in the instant case were not even allowed to contest the validity or propriety of the lay off decision. Further, they were denied their request for the economic information which the *Johnson* court held should be disclosed to laid off employees.

Respondent denied petitioners an opportunity to rebut the reasons given for laying them off. There is no doubt that respondent's actions severely affected the rights of petitioners. They were no longer able to work at Oak Forest or Cook County Hospitals. By affording petitioners a limited hearing in which they could not rebut the reasons for their lay offs, petitioners were denied fundamental aspects of due process of law. *Greene* v. *McElroy*, 360 U.S. 474 (1959). In *Greene*, this Court held:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. *Id.* at 496.

An opportunity to meet and rebut evidence realized by an administrative agency has long been regarded as the primary requisite of due process. *Ralpho* v. *Bell*, 569 F.2d 607 (D.C. Cir. 1977); *Virgin Islands Hotel Association* v. *Virgin Islands Water and Tower Authority*, 465 F.2d 1272, 1276 (3rd Cir. 1972); *Moore-McCormack Lines, Inc.* v. *United States*, 413 F.2d 568, 585 (Ct. Cl. 1969). In the instant case, petitioners could not rebut the asser-

tions that they were laid off for a lack of funds. In fact, their request for a subpoena was denied and the hearing officer ruled they could not contest the validity of their lay off decision.

Because petitioners are seeking a post-lay off forum for a serious personnel transaction affecting them, respondent's operations would not be impaired. The post-lay off proceeding does not delay the lay off, because the employees have already been removed from the payroll. Nor does it create confusion or uncertainty concerning the status of employees. The post-lay off proceeding is, therefore, substantially different from the pre-lay off preliminary hearings requested by employees in *Powell* v. *Jones.*

The net effect of the Appellate Court's decision is to preclude public employees in Illinois from challenging a lay off decision and rebutting the legal presumption that public employers act in good faith with reasonable exercise of discretion. In not allowing an attack of the lay off decision or allowing plaintiffs to rebut evidence, the court has elevated the presumption of good faith to an irrebuttable and permanent status. This result is forbidden by the due process clause. *Vlandes* v. *Klein,* 412 U.S. 441, 452 (1973).

This Court has recognized that even temporary deprivations of property are entitled to due process protection. *Goss* v. *Lopez,* 419 U.S. 565, 567 (1975); *Fuentes* v. *Shevin,* 407 U.S. 67, 86 (1972); *Stypmann* v. *City and County of San Francisco,* 557 F.2d 1338, 1342 (9th Cir. 1977). If a high school student under *Goss* is entitled to a due process hearing to contest a ten day suspension from school, then *a fortiori,* full time employees with property rights are entitled to contest the reasons given

them for their alleged layoff. Plaintiffs were not given the fundamental requirement of due process—an opportunity to be heard at a meaningful time and in a meaningful manner and to rebut the reasons for lay off.

CONCLUSION

For all of the foregoing reasons, petitioners respectfully request this court to grant their petition for a writ of certiorari to the Appellate Court of Illinois.

Respectfully submitted,

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APPENDICES

APPENDIX

Second Division
December 2, 1980

No. 79-2121

JOHN E. ALTMAN, et al.,

Plaintiffs-Appellees,

v.

THE HEALTH AND HOSPITALS GOVERNING COMMISSION OF COOK COUNTY,

Defendant-Appellant.

Appeal From The Circuit Court Of Cook County
Honorable NATHAN M. COHEN, *Judge Presiding.*

MR. JUSTICE DOWNING delivered the opinion of the court:

Plaintiffs, 83 former employees of defendant Health and Hospitals Governing Commission of Cook County (the Commission),[1] brought this action seeking reinstatement of employment. After a bench trial, the court made several findings of fact and concluded the Commission, arbitrarily and in bad faith, laid-off plaintiffs. The court then awarded plaintiffs back pay and ordered their reinstatement. On appeal, the Commission raises two issues: (1) whether the trial court's findings are against the manifest weight of the evidence; and (2) whether plaintiffs were afforded hearings which satisfied due process of law requirements.

On March 27, 1978, plaintiffs were notified that they would be laid-off "due to lack of funds," effective April

[1] Effective November 30, 1979, the Commission's enabling statute was repealed by the County Hospitals Act (Ill. Rev. Stat. 1979, ch. 34, par. 5011 *et seq.*, as amended by Pub. Act 81-1197, effective November 30, 1979) and, according to appellant's brief, the County of Cook became its successor in interest.

7, 1978. Plaintiffs are tradesmen who were "merit employees" working in the Building and Grounds Departments at Oak Forest and Cook County Hospitals. These health care facilities were operated by the Commission pursuant to the County Hospitals Governing Commission Act (Ill. Rev. Stat. 1977, ch. 34, par. 5011 *et seq.*).

On April 18, 1978, plaintiffs filed this action. Count one of the second amended complaint alleges the Commission's March 22, 1978 resolution authorizing a reduction in expenditures and a lay-off of employees was not required because the Cook County Board of Commissioners appropriated increased funds for fiscal year 1978 which were sufficient to continue plaintiffs' employment. Therefore, plaintiffs allege, their lay-offs were in bad faith. Count two states plaintiffs have a constitutionally-protected property interest in their continued employmen sufficient to require plenary hearings regarding lay-offs. Defendants answered that its total funding for fiscal year 1978 was insufficient to meet all expenses in its original proposed 1978 budget, and it therefore exercised its discretion and reduced budgeted expenditures by, *inter alia*, reorganizing its construction program and laying-off plaintiffs. Defendants also respond that plaintiffs had access to adequate hearings.

At trial, several plaintiffs testified as to the nature and duties of their former employment, their years on the job, and the wages and benefits they received. Workers in the following categories were given notices of a lay-off on March 27, 1978: carpenters, painters, plasterers and lathers, plumbers, bricklayers, electricians, and steam fitters. A glazier was also laid-off. However, not all tradesmen were laid-off.

The April 7 lay-off notices indicated the lay-off was "due to a lack of funds" and that any recalls would follow the Commission's Personnel Policy and Procedures Manual. Some of the laid-off employees requested and were given hearings to contest the procedures used in their lay-offs. The scope of these hearings did not ex-

tend to inquiry regarding the justification for the lay-offs. Four employees at the Oak Forest Hospital were subsequently recalled.

Plaintiffs also adduced testimony that Thomas Quilty, the mechanics supervisor at Cook County Hospital, told plaintiffs Gary Ellinger and John Crocco that all painters and bricklayers would be laid-off in order to eliminate the foremen of those shops. Forty-two tradesmen were employed in those shops.

Plaintiffs introduced various exhibits which included Commission purchase orders for services performed by subcontractors. These services paralleled, in many cases, the work previously performed by the civil service plaintiffs. The purchase orders indicated the subcontracted services were performed on an as-needed basis throughout the next 18 months at both facilities. A major renovation of a building at Oak Forest Hospital was accomplished through subcontracted work, although that work was not let by the Commission.

Testimony indicated plaintiffs were not explicitly told they had a right under Commission policy to request transfers to other positions at the hospitals. Non-trade job positions were subsequently filled with new employees.

Defendants produced the testimony of James G. Haughton, the Commission's executive director. He testified that the Commission received its funds from patients and third party payers. The balance of its funds is provided by the Cook County Board of Commissioners (the Board). The Commission's budgets are set and approved by the Board. The Board approved a 1978 budget which was $18 million less than what the Commission requested. Haughton advised the Commission of that fact and it passed a resolution, No. 78-HHGC-50, authorizing him to make reductions in budgeted expenditures. The reductions were to be made with the object of maintaining patient care quality. Hospital directors were told to submit reduction proposals. One of those proposals included a lay-off of plaintiffs. Haughton approved that proposal, among others.

Members of the Commission also testified that they were apprised of the financial crisis and that an expected $8 to $10 million revenue shortfall necessitated cutbacks. They then voted for the above numbered resolution.

John DiLisi, director of the Building and Grounds Department at Cook County Hospital, testified that Thomas Quilty had no authority to lay-off any employee. He also stated that after the lay-off several contracts were let for services never previously performed by plaintiffs.

Robert Landsman, an independent accountant, testified that he reviewed the proposed budget and anticipated shortfall with members of the Commission after his firm had conducted a hundred hour examination of the Commission's finances. Defendant then submitted to the court various exhibits in support of its testimony.

After argument of counsel the trial court orally stated its findings:

> "The evidence clearly showed that the members of the Commission believed that they were going to fall short of their anticipated budget by several million dollars, and that some budget cuts would have to be made. The members desired to make cuts in areas that would least effect patient services. That is, the trades involved in construction and maintenance.
>
> Decisions regarding layoffs were based on seniority lists as mandated by the merit system and notices were duly sent. None of these procedures were seriously contested by plaintiffs."

The court went on, however, to find that defendant failed to answer plaintiffs' claim that some in-house tradesmen could have been retained on an as-needed basis, rather than hiring outside contractors. The court surmised that such retentions "might actually have saved the defendant a greater sum of money," and furthermore, that at least some subcontractors charged an hourly cost greater than the in-house tradesmen. The court found that the only logical reason for the extensive lay-offs was to get rid

of a few senior foremen. It then concluded the evidence shows bad faith.

The court held plaintiffs were entitled to, but wrongfully denied, plenary hearings to challenge the reason for their lay-offs, and that the lay-offs were really intended as terminations. Plaintiffs were ordered reinstated with back pay, benefits, and other conditions of employment.

I.

Defendant claims the trial court's findings are against the manifest weight of the evidence. It argues plaintiffs failed to rebut the legal presumption that the Commission acted in good faith and with reasonable exercise of discretion. Absent such a rebuttal, defendant concludes its action in approving the lay-offs is beyond judicial evaluation.

Plaintiffs do not contest here the Commission's authority to order lay-offs due to lack of work or funds. Plaintiffs allege the reason for their lay-offs was neither. They contend the Commission acted in bad faith. "Bad faith" is a "mixture of motive and result * * *." (*Chestnut* v. *Lodge* (4th Dist. 1966), 77 Ill. App. 2d 281, 288, 222 N.E.2d 36, *leave to appeal den.* (1967), 35 Ill. 2d 630.)[2] An analysis of evidence relative to both is therefore appropriate.

The record discloses no evidence of bad faith motive chargeable to the Commission. Commission members testified that they voted for the resolution directing a reduction in expenditures because they were concerned about the anticipated $8 to $10 million shortfall of revenue. They wanted to maintain patient services. Physical plant maintenance and construction expenditures were therefore a logical area to address reductions. The trial court's initial finding is consistent with this conclusion. The trial court, however, subsequently focused upon evi-

[2] For a definition of "bad faith" see also Black's Law Dictionary 127 (5th ed. 1979).

dence that a supervisor indicated in conversation with two plaintiffs that all painters and bricklayers would be laid-off to "get at" the foremen of those shops. Uncontroverted testimony indicates that the supervisor was without authority to order such a lay-off. Furthermore, even an "established vendetta" of plaintiffs' immediate supervisor is insufficient to establish that those in authority made a bad faith lay-off. (*Juergensmeyer* v. *Bensinger* (4th Dist. 1972), 7 Ill. App. 3d 698, 699, 288 N.E.2d 519.) Therefore, no bad faith motive has been shown.

The manifest weight of the evidence also indicates no bad faith result. Plaintiffs contend the lay-offs were ordered to remove a few foremen who drew the ire of a supervisor. The lay-offs at issue affected 83 tradesmen in eight trades. Approximately 500 other employees were laid-off at the same time. We find it difficult to believe lay-offs of such magnitude can be traced to a relatively minor personnel problem. Rather the evidence clearly shows that had plaintiffs been retained in their former positions, their wages and benefits would have amounted to $1,869,634. It is uncontested that maintenance and construction work was reduced under the 1970 budget. Contracts let to outside companies who arguably performed some of the services previously done by plaintiffs amounted to $537,060.30. A $1,332,574 reduction in maintenance and construction expenditures was accomplished after the lay-offs. This savings does not include reduced costs for materials supplied by outside contractors. Thus, notwithstanding the fact that unit costs for some trades might have been lower if performed by plaintiffs, the Commission achieved substantial reduction in maintenance and construction costs. The Commission's stated motive for the lay-offs resulted in savings. Such action does not amount to "bad faith."

The uncontested motive and result of the Commission's action was to save money. It was not within the trial court's authority to second guess the Commission on how it could effect a savings. (*People ex rel. Behnke* v. *Mc-*

Laughlin (1935), 362 Ill. 274, 277, 199 N.E. 810.) The question for the trial court was whether bad faith was evident (see *City of Chicago* v. *People ex rel. Byrne* (1st Dist. 1904), 114 Ill. App. 145, 155), and absent that evidence a presumption of good faith survives. See generally *Levesque* v. *Walker* (4th Dist. 1974), 24 Ill. App. 3d 828, 831, 321 N.E.2d 278; *Chestnut* v. *Lodge, supra,* 77 Ill. App. 2d at 288-89; *O'Neill* v. *Fitzsimmons* (1st Dist. 1904), 114 Ill. App. 168, 171-72, *aff'd Fitzsimmons* v. *O'Neill* (1905), 214 Ill. 494, 73 N.E. 797.

Finally, we believe plaintiffs' reliance upon *People ex rel. Byrnes* v. *Stanard* (1956), 9 Ill. 2d 372, 377, 137 N.E. 2d 829 and *People ex rel. Jacobs* v. *Coffin* (1918), 282 Ill. 599, 610, 119 N.E. 54 is inapposite. These cases involve the replacement of individual civil service employees through the uncontested use of subterfuge. Each non-civil service replacement employee performed duties identical to those performed by his predecessor. Each employer's apparent aim was to terminate a particular employee. Absent these facts, neither case requires a finding of bad faith here. Accordingly, the trial court's finding of bad faith is against the manifest weight of the evidence.

II.

Defendants also contend the trial court erred when it held plaintiffs were unconstitutionally denied a plenary hearing during which they could challenge the grounds for their lay-offs.

Plaintiffs concede the Commission's conduct did not result in any violation of a substantive due process right. Rather they contended at trial that their job lay-offs were predicated upon bad faith and abuse of discretion. They point to a provision in the Commission's enabling statute as requiring a full hearing upon their discharge. (See Ill. Rev. Stat. 1977, ch. 34, par. 5026.) They argue that their lay-offs are equivalent to discharges and that because they were not permitted to challenge the basis of those lay-offs during the hearings

afforded them, their statutory right to a full hearing has been denied. Furthermore, they rely upon several cases for the proposition that their expectation in continued employment amounted to a property interest which could not be taken in the absence of a full hearing. See generally *Board of Regents* v. *Roth* (1972), 408 U.S. 564, 577-78, 33 L. Ed. 2d 548, 92 S. Ct. 2701; *Young* v. *Brashears* (7th Cir. 1977), 560 F. 2d 1337, 1340; *Mims* v. *Board of Education* (7th Cir. 1975), 523 F. 2d 711, 715.

Plaintiffs' cases are inapposite. Plaintiffs were laid-off in good faith. No discriminatory purpose is alleged. They were not "discharged" as that term is used in section 5026 of the County Hospitals Governing Commission Act. That Act contains virtually the same language as did the statute in *Fitzsimmons* v. *O'Neill, supra,* where the supreme court stated:

> "That section refers to cases where an officer or employee is removed for some reason personal to himself. His right to be heard in his defense upon written charges, • • • implies that the cause of his removal is some dereliction, or neglect of duty, or incapacity to perform duty, or some delinquency, which affects his fitness for the position occupied by him. The provision in question does not apply to a case where the incumbent is dismissed for want of funds • • •." (214 Ill. at 503.)

The Commission provided for a hearing allowing laid-off employees to challenge the procedure for lay-offs. The statute requires no more.

Finally, although plaintiffs may have a constitutionally-protected property interest in their expected employment, that interest is adequately protected by the hearing provided them. (*Powell* v. *Jones* (1973), 56 Ill. 2d 70, 82, 305 N.E. 166.) In *Powell* v. *Jones,* our supreme court assessed the protections constitutionally mandated in *Perry* v. *Sindermann* (1972), 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694, and *Board of Regents* v. *Roth, supra,* and concluded that in the case of lay-offs, as distinguished

from discharges, a plenary hearing was not required. "It would be virtually impossible for State government to function without substantial confusion, delay and uncertainty if each certified employee were entitled to receive a plenary hearing prior to a lay-off." (56 Ill. 2d at 82.) Plaintiffs in the instant case were afforded an opportunity to challenge the procedure governing their lay-offs. Although the scope of that hearing was limited and did not extend to challenges of the Commission's discretionary acts, plaintiffs were entitled to no more.

In accordance with the aforementioned reasons, the judgment of the circuit court of Cook County is reversed.

Reversed.

STAMOS and HARTMAN, *JJ.*, concur.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

JOHN E. ALTMAN, et al.,

Plaintiffs,

vs.

THE HEALTH AND HOSPITALS GOVERNING COMMISSION,

Defendant.

No. 78 CH 2472

REPORT OF PROCEEDINGS

BE IT REMEMBERED that on the 31st day of October, 1979, this cause came on for hearing before the Honorable NATHAN M. COHEN, one of the judges of said court.

COUNSEL PRESENT:

ASHER, GREENFIELD, GOODSTEIN,
PAVALON & SEGALL, LTD.,
BY: MR. JOEL A. D'ALBA,
on behalf of the Plaintiffs;

MR. WILLIAM P. TUGGLE,
on behalf of the Defendant.

THE CLERK: Altman versus The Health and Hospitals Governing Commission.

MR. TUGGLE: William P. Tuggle. Good Afternoon.

THE COURT: Good afternoon, gentlemen.

MR. TUGGLE: For the record, William P. Tuggle appearing on behalf of the defendant, Health and Hospitals, Governing Commission.

MR. D'ALBA: Joel D'Alba on behalf of the plaintiffs.

THE COURT: Plaintiffs in this matter, approximately 60 former employees of the defendant Commission

who were laid off allegedly due to insufficient funds. Plaintiffs originally protested the layoffs by instituting proceedings under the grievance procedures established by the Commission. However, once informed that they would not be allowed to contest the reason for the layoffs, only the manner in which they were conducted, the plaintiffs dropped those proceedings and brought suit in this court.

First count of the Complaint alleges that the Commission did in fact have sufficient funds to continue at least some of the plaintiffs in its employ; the layoffs were therefore arbitrary, capricious and without just cause.

Count II alleges that the plaintiffs were denied due process because they were not allowed to contest layoffs in any meaningful way.

After this Court ruled that plaintiffs had a protectible property right and were entitled to be heard, trial was had on the issue whether or not defendant acted in good faith with regard to the layoffs. The defendant claims that the plaintiffs failed to meet their burden of proof in overcoming the presumption that the Commission acted properly and in good faith.

The evidence clearly showed that the members of the Commission believed that they were going to fall short of their anticipated budget by several million dollars, and that some cuts would have to be made. The members desired to make the cuts in areas that would least effect patient services. That is, in the trades involved in construction and maintenance.

Decisions regarding layoffs were based on senority lists as mandated by the merit system and notices were duly sent. None of these procedures were seriously con-

tested by the plaintiffs. The evidence therefore proves, defendant argues, that the stated reasons for the layoffs was true, the that Commission followed the correct procedure with regard to the layoffs, and that the Commission was acting in good faith.

However, several issues raised by the plaintiffs were not answered satisfactorily by the defendant, not the least of which is why the defendant could not simply have retained a certain number of the in-house tradesmen on as as-needed basis, rather than hiring outside subcontractors. Not only would that reduce greatly the hardship caused to the plaintiffs and in keeping more with the spirit of the tenure provisions of the Civil Service Act, but it might actually have saved the defendant a greater sum of money.

Evidence adduced by the plaintiffs showed that at least some of the subcontractors charged a unit cost greater than the in-house tradesmen. For example, painters hired by defendant were paid $15 an hour each, whereas the in-house painters did the same work for $10 an hour. This is noted in the transcript page 908. Unless the defendant's own stated goal might have been accomplished by retaining some of the plaintiffs instead of hiring outsiders.

The only explanation offered for defendant's apparently illogical behavior was contained in testimony by Mr. Wayne Mills, the business representative for the painters union. This witness testified that after the layoffs were announced, he approached John Delisi to ask why at least some of the men would not be retained. His response was, "Well, because to get rid of a few, we have to get rid of all of them." See transcript page 857. That statement is clearly untrue unless he desired to "get rid

of" the few at the top of the seniority list where the established procedure mandates dismissal only in reverse order of seniority.

The plaintiffs produced evidence to show that, in fact, Mr. Delisi wanted to remove the two foremen at the top of the seniority list. This evidence is uncontroverted; the defendant has offered no other plausible reason for defendant's offer of help over the retention of some of the plaintiffs.

The picture showed from the testimony shows clear evidence of bad faith. Rather than taking the proper procedural testimony to remove the foreman, the defendant took advantage of the budgetary deficit to sacrifice the jobs of those plaintiffs who would otherwise have been retained even in the face of the short fall. In aggravation, after the layoffs were announced, the defendant made no attempt either to ease the plight of the plaintiffs or even to inform them of their rights.

As this Court already pointed out, the beneficent employer would have informed them that they would not be recalled at the end of the 3, 4 month grace period during which the plaintiffs were entitled to fringe benefits. Instead, the defendant left them with the false hope they might retain their jobs. No attempt was made to fit the plaintiffs with another job at the hospital where, even if they were not working at their specific trades, they could at least have an income and some job security.

Although plaintiffs were granted a hearing as mandated by the Civil Service Act, even that safeguard was vitiated by refusing to allow plaintiffs to challenge the reason for the layoffs, which constituted the core of their grievance. Finally, adding insult to injury, at the

same time the plaintiffs were being deprived of their livelihood for lack of funds, the defendant's members voted themselves a raise in salary.

The defendant's whole course of conduct has displayed a complete disregard for both its employees' welfare, its tenured employees' health welfare and the very spirit and purpose of the Civil Service Act which was designed to protect merit employees from precisely arbitrary termination of their employment.

In considering the question of placement of Civil Service employees, the courts have unanimously held that civil servants with the requisite seniority, have first rights to any position for which they have been trained. In *People ex rel Fleming versus Geary,* 54 Northeast 2nd 247, 1949 decision, the Illinois Appellate Court held at page 250:

> "There is no question but that a civil service employee, who is on a civil service reinstatement list and possesses the requisite seniority rights, is entitled to appointment to any vacancy in the particular position for which he was examined and that no no discretion may be exercised as to such appointment.
>
> "While civil service employees may be laid off for lack of work or lack of funds and while the city has a right to actually and in good faith discontinue any positions when the same become no longer necessary or useful or for the purpose of economy, yet neither it nor the commission has any right to continue such positions in force for some other persons in an entirely different class and grade and thereby deprive employees who are fully eligible under the Civil Service Act and the rules of the commission of their lawful rights to reinstatement and appointment to those positions."

See also the Mims case which you are both also familiar. The Mims case was also a landmark case, and *Morrison versus City of Moline* which was cited here. These cases all involve the replacement with other civil service employees.

In cases where non-civil servants are used, the argument is even more compelling. You have even more seniority in that case than you have in the case at bar. In *Cunningham versus Community College District Number 3,* 489 Pacific 2nd 891, a state of Washington Supreme Court decision (1971), the college decided that food service could be provided to a new dormitory better and more economically by an independent contractor with its own employees, rather than by the college's own civil service employees. After first noting that the funds were rather weak, the court stated on page 896:

> "This alternative condition precedent to layoff, of curtailment of work, cannot be established by merely showing that the employer has determined, for whatever reason, to have the work accomplished by others. Such interpretation of the board's rule would render any limitation upon an employer's right to remove an employee (whether by discharge, layoff, or by any other means) meaningless, completely thwarting the purposes for a civil service system. In short, the discharge of appellants was not based on merit principles and scientific methods of personnel administration as prescribed by the legislature and carried into effect by the board rules."

Washington Federation of State Employees, AFL-CIO Council 28 versus Spokane Community College 90 Washington 2nd 698, a 1978 decision is particularly apposite. In that case a college contracted with an independent contractor to provide maintenance service normally done by civil servants in order to save an estimated $210,000 per year. Although this was an expanding facility and therefore no civil servant em-

ployed would lose her job as a result of the contract, the court nevertheless held the contract invalid. The court stated on 477 and 478:

> "The policy of the civil service system is to establish merit as the basis for selecting personnel. It creates a classified service composed of civil servants selected on the basis of merit to fill the state's personnel needs. Procurement of services ordinarily and regularly provided by classified civil servants through independent contracts, although not specified prohibited by the State Higher Education Personnel Law, directly contravenes its basic policy and purpose. *Osterlof versus University of Washington,* 17 Washington Appellate 621, 564, Pacific 2nd 814 (1977). Therefore, where a new need for services which have been customarily and historically provided by civil servants arises, and where there is no showing that civil servants could not provide those services, a contract for such services is unauthorized and in violation of the State Higher Education Personnel Law.
>
> "This is so regardless of the cost savings which might be made through such a contract.
>
> "The general rule is that public services are to be performed wherever practicable by public employees. Neither a private individual nor a firm may be hired to perform the normal or routine duties of a public agency.
>
> "We may conclude, therefore, that where the public agency seeks to make an agreement with an individual to perform personal services for the municipality under its direction and supervision (as is done in cases of its regular employees), or makes an agreement delegating to an individual, firm or corporation the authority to employ persons to perform personnel services for the government, to be paid by the government and to be directed and supervised by the governmental agency, or it clearly appears that such arrangement seeks

to evade the civil service law and rules, such contract employments would be held invalid."

Now, it's clear in the case at bar that the services of those employees who were terminated would, if not needed on a daily basis, of necessity be needed from time to time and for periods of time on a daily basis. It is also clear from the evidence that the employees terminated were capable to perform all of the work for which the subcontractors were hired during the period of their layoff and ultimate termination and I note here that not ironically, but sadly it wasn't really a a layoff.

From the outset it was intended to be a termination and the employees here should have been so notified, but if this was done, the game the defendants played with the employees would not have worked to their advantage and they would have been met as they should have been met forthwith with a conference over such termination and the hardship upon these employees would have been greatly diminished.

The defendant in this case tries to distinguish cases of which cited on facts, but we cannot dispute the principles and tenets underlying the decision, several of which as patently a fortiori in support of plaintiffs' position in the case at bar. These principles and tenets remain the same and apply here even though there may be certain distinctive features in each of the cases, features different from some of the facts listed in this trial. The defendant cited no authority which clearly favors its position and I would join with defendant in the conclusion that none exists.

Thus even if the subcontractors were to cost less per unit than the in-house tradesmen, the defendants would still not be entitled to replace its tenured employees with outside help. The entire purpose of the merit system as embodied in the Civil Service Act and interpreted by the courts is to provide employees with job security except when discharged for cause.

If workers could be replaced merely to save money, they could be laid off from time to time intercesse, thereby emasculating the statutory scheme of job security for tenured employees and render the very principles and purpose of the Civil Service Act illusory. The Court therefore grants the prayer of the complaints, find that the equities are in favor of plaintiffs and against the defendant and directs counsel for the plaintiffs to prepare appropriate order forthwith. Off the record.

[Whereupon, a discussion off the record ensued.]

Mr. Tuggle: If the Court please, may I for the record?

The Court: Yes.

Mr. Tuggle: Since I understand that your Honor is leaving the bench after today, the defendants move of the court for the order granting a new trial. With all due respect to the Court, we have listened respectfully to the Court's decision and order and it is the belief of counsel, and I will have to be constrained to advise the defendants that I believe the Court in this matter has committed reversible error. I therefore respectfully request the Court to enter our motion for a new trial at this time.

The Court: Your motion is denied, and as you have implied in your oral motion the defendant intends to appeal, and certainly they are right in acting in good faith, I will proceed according to what their rights and premises. I hope they do so with dispatch because this matter should be resolved at the earliest possible moment to alleviate the hardship it has caused for many faithful employees of the Cook County Health and Hospital Governing Commission.

Mr. Tuggle, you are an estimable counsel. There is a tinge of sadness in not being able to rule in your favor. It was a pleasure to have you here. Same for you, sir.

Mr. D'Alba: Thank you, your Honor. The plaintiffs will enter in the order a requirement that the defendant reinstate the employees, that the subcontrac-

tors be removed from the scene, that the employees be brought back to work.

The Court: So ordered. I'm sure Mr. Tuggle will pray for a stay of that order. I feel that motion for stay should be addressed to the Appellate Court.

Mr. Tuggle. Indeed it will be, your Honor.

Mr. D'Alba: Thank you very much, your Honor. Best wishes to you.

[Which were all the proceedings had in this matter on this date.]

State of Illinois)
) SS.
County of Cook)

I, Mary S. Shanahan, do hereby certify that I am a Certified Shorthand Reporter and notary public in and for the County of Cook and State of Illinois; and I reported in shorthand the testimony and other proceedings had at said report of proceedings and that the foregoing pages is a true and correct transcript of my shorthand notes so taken as aforesaid, and contains all the testimony and other proceedings had at said report of proceedings.

I further certify that I am not a relative or employee or attorney or counsel of any of the parties, or a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my seal of office, at Chicago, Illinois, this 6th day of November, A.D., 1979.

/s/ Mary S. Shanahan
Notary Public
Lake County, Illinois

My Commission expires: July 11, 1981.

EXHIBIT A

State of Illinois)
) SS.
County of Cook)

STATE OF ILLINOIS
BEFORE THE HEALTH AND
HOSPITALS GOVERNING COMMISSION

In the Matter of the Merit System Hearing Involving:

WILLIAM HACKETT,

Petitioner,

and

COOK COUNTY HOSPITAL,

Respondent.

Case No. 78-33-1

DECISION

This hearing was held on June 6 and June 20 1978 pursuant to applicable statutes and resolutions. This hearing occured as a result of the hospital decision to lay HACKETT off from his position as Electrician in the Department of Building and Grounds, effective April 4, 1978.

The record reflects that HACKETT began working at Cook County Hospital on or about May 5, 1969. Prior to coming to work, at the hospital, HACKETT had been employed by the City of Chicago as an Electrician under Civil Service for nine years. At the time of the lay-off, there was in existence, Resolution 78 HHCC-66, which covered lay-off procedures both substantively and procedurally.

In reviewing the record the undersigned finds that three issues exist:

1) Whether Hackett's seniority with the City of Chicago should have been bridged in determining if he should have been laid off;

2) Whether electricians at Cook County Hospital with less seniority than Hackett should have been laid off instead;
3) Whether there in fact was a lack of funds to justify the lay-off.

Under the lay-off policy in effect (78 HHCC-66) the undersigned can find no provision mandating the bridging of seniority. Under Chapter 34 Section 5026, Illinois Revised Statutes, the undersigned believes that "bridging" pertains to county entities, not to city and county entities. Accordingly Petitioner's objection in their regard is overruled.

Petitioner next contends that electricians with less seniority at Cook County should have been laid off instead. Under the lay-off policy as previously referred to, it is clear that lay-offs are to be conducted by facilities. Thus it does not matter that electricians at Cook County with less seniority than Hackett were retained.

Finally, under the lay-off policy, the undersigned has jurisdiction only to ensure that correct procedures were followed. The undersigned does not have jurisdiction to test the validity of the reasons given for the lay-off.

Accodingly, the hospital's decision to lay-off Hackett is affirmed.

Dated: November 1978

/s/ Gregory A. Wilson
Hearing Officer

ILLINOIS SUPREME COURT

Clell L. Woods, Clerk
Supreme Court Building
Springfield, Ill. 62706
(217) 782-2035

March 30, 1981

Mr. Lester Asher
Attorney at Law
228 N. LaSalle St., S#1900
Chicago, IL 60601

No. 54473 - John E. Altman, et al., petitioners, vs. The Health and Hospitals Governing Commission of Cook County, respondent. Leave to appeal, Appellate Court, First District.

The Supreme Court today denied the petition for leave to appeal in the above entitled cause.

Very truly yours,
/s/ Clell L. Woods

Clerk of the Supreme Court